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No. 89-43

In The

Supreme Court of the United States

October Term, 1989

JOHN ERIC HUGHES,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE GEORGIA SUPREME COURT

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Senior Assistant Attorney General
Counsel of Record for Respondent

MICHAEL J. BOWERS
Attorney General

H. PERRY MICHAEL
Executive Assistant
Attorney General

WILLIAM B. HILL, JR.
Deputy Attorney General

SUSAN V. BOLEYN
Senior Assistant
Attorney General

C. A. BENJAMIN WOOLF
Staff Attorney

Please serve:
MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3349

Lex Publishing Company, 2161 Monroe Dr., Atlanta, Georgia 30324 (404) 875-5140

QUESTION PRESENTED

1.

Did the Supreme Court of Georgia properly conclude that the alphabet test and physical dexterity tests of a field sobriety test were admissible because they were not evidence of a testimonial or communicative nature?

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BRIEF IN OPPOSITION FOR THE RESPONDENT

PART ONE

STATEMENT OF THE CASE

Petitioner, John Eric Hughes, was charged in Cobb County, Georgia on October 17, 1987, with one count each of the traffic offenses of improper lane useage, improper passing, failure to obtain a Georgia driver's license, and driving under the influence. Prior to trial, Petitioner filed a motion in limine and a motion to suppress based upon his detention and subsequent arrest. The hearing was held on the motion in limine and motion to suppress on May 10, 1988. Following that hearing, the trial court issued an order granting the motion on May 23, 1988.

The state subsequently filed a notice of appeal to the Court of Appeals of Georgia on June 20, 1988.

On appeal, the state asserted that the trial court erred in granting the motion to suppress, focusing on the trial court's ruling that the roadside traffic stop constituted a custodial interrogation. After reviewing the case, the Court of Appeals of Georgia reversed the decision of the trial court concluding that the routine momentary detention occasioned by the traffic stop did not constitute a custodial situation. *State v. Hughes*, 189 Ga. App. 671, 377 S.E.2d 192 (1988). The Petitioner subsequently filed a petition for a writ of certiorari in the Supreme Court of Georgia. After reviewing the case, the Supreme Court of Georgia affirmed in part and reversed in part the ruling of the Court of Appeals of Georgia, holding that the trial court properly suppressed evidence of conversations between Petitioner and the police, but that the field sobriety tests were not inadmissible under the Fifth Amendment to the United States Constitution because they were not evidence of a testimonial or communicative nature. *Hughes v. State*, 259 Ga. 227, __ S.E. 2d __ (1989).

Petitioner has now filed the instant petition for a writ of certiorari to this Court challenging the decision of the Supreme Court of Georgia.

PART TWO

STATEMENT OF THE FACTS

The following facts were set forth by the Court of Appeals of Georgia in relation to the traffic stop in question:

> Officer J. R. Barner, while off-duty and operating his own vehicle, was forced off the road by the erratic driving of the appellee. Officer Barner followed

> appellee's vehicle and observed appellee commit numerous traffic offenses. When appellee eventually pulled into the parking lot of an apartment complex and stopped, Officer Barner followed and pulled in behind appellee's vehicle. Officer Barner approached appellee and identified himself as a police officer. Officer Barner was asked to produce his identification and he complied. At the request of Officer Barner, by-standers telephoned 911 to relay the report that an officer was in need of assistance in the parking lot of the apartment complex and, within 3 or 4 minutes, other officers arrived at the scene. During those few minutes before the other officers arrived, Officer Barner asked appellee for his driver's license and he engaged appellee in general conversation. At one point, Appellee suggested that he was simply going to drive away, but Officer Barner informed him that he would not be allowed to do so. Officer Robert Littler, who had arrived at the scene in response to Officer Barner's request for assistance, asked appellee to perform field sobriety tests. Based upon Appellee's performance of those tests and the information supplied by Officer Barner, Officer Littler placed Appellee under formal arrest for driving under the influence. At no time prior to this formal arrest by Officer Littler was appellee ever advised of his Miranda rights.

State v. Hughes, 189 Ga. App. at 671.

The field sobriety tests at issue consisted of a recitation of the alphabet from A to Z and two physical dexterity tests.

Further facts will be developed as necessary to examine issues presented in the instant petition for a writ of certiorari.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD DECLINE TO GRANT THE INSTANT PETITION BECAUSE THE RULING BY THE GEORGIA SUPREME COURT WAS A PROPER APPLICATION OF THE PRECEDENT OF THIS COURT.

Petitioner's question does not present a basis for granting certiorari by this Court. Notwithstanding Petitioner's assertions to the contrary Respondent submits that the Georgia Supreme Court properly ruled that the field sobriety test, and particularly the "alphabet test" portion at issue in this petition was "not inadmissible under the fifth amendment of the United States Constitution because they were not evidence of a testimonial or communicative nature. *Schmerber v. California*, 384 U.S. 757, 761 (86 SC 1826, 16 LEd 2d 908) (1966)." *Hughes v. State*, 259 Ga. 227, 228, __ S.E.2d __ (1989).

Each component of the field sobriety test is a non-communicative "display of identifiable physical characteristics," not protected by *Miranda's* prophylactic application of the privilege against compulsory self-incrimination. *Miranda v. Arizona*, 384 U.S. 486, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966). *United States v. Dionisio*, 410 U.S. 1, 5-6, 93 S.Ct. 764, 767, 35 L.Ed. 2nd 67, 74-75 (1973). The alphabet test, particularly at issue in the present action, is "used solely to measure the physical properties of the [witness' voice], not for the testimonial or communicative content of what was to be said," in the instant case the degree of Petitioner's intoxication. *Dionisio*, 384 U.S. at 7.

Respondent submits therefore that the "alphabet test" simply requires a driver to submit their voice for examination, much

like the accused bank robber in *United States v. Wade*, 388 U.S. 218 (1967) was forced to utter in a lineup words that had allegedly been spoken by the robber, and so was "required to use his voice as an identifying physical characteristic, not to speak his guilt." *Wade*, 388 U.S. at 222-223. Similarly, handwriting and voice examplars, although a means of communication, have been held by this Court not to be testimonial in nature and thus not protected against compulsory self-incrimination. *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Dionisio*.[1] Respondent notes in addition that Petitioner conceded in his original motion in limine and motion to suppress before the trial court that the Petitioner was allegedly compelled to "perform several *non-communicative acts* such as *saying the alphabet*; the finger to the nose tests; etc. ... against his will which incriminated this Defendant." (R. 13; emphasis supplied).

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[1] Respondent notes that in a recent case on similar facts this Court specifically declined to "reach the issue of whether recitation of the alphabet in response to custodial questioning is testimonial and hence inadmissible under *Miranda v. Arizona*, 384 U.S. 436, S.Ct. 1602, 16 L.Ed. 2d 694 (1966)." *Pennsylvania v. Bruder*, __ U.S. __, 109 S.Ct. 205, 207 n. 3, 102 L.Ed. 2d 172, 177 n. 3 (1988).

CONCLUSION

For all of the above and foregoing reasons, Respondent prays that the petition for a writ of certiorari filed on behalf of John Eric Hughes be denied.

Respectfully submitted,

MICHAEL J. BOWERS 071650
Attorney General

H. PERRY MICHAEL 504000
Executive Assistant
Attorney General

WILLIAM B. HILL, JR. 354725
Deputy Attorney General

SUSAN V. BOLEYN 065850
Senior Assistant
Attorney General

MARY BETH WESTMORELAND 750150
Senior Assistant
Attorney General

C. A. BENJAMIN WOOLF 775990
Staff Attorney

Please serve:
MARY BETH WESTMORELAND
132 State Judicial Building
40 Capitol Square
Atlanta, Georgia 30334
(404) 656-3349